## GERARD JUDE TIMOTHY PEREIRA v. KASI KL PALANIAPPAN

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: 22NCVC-662-05-2012]
19 JUNE 2015

***CONTRACT:*** *Loan – Friendly loan – Allegation of – Claim for repayment – Loans not documented in writing – Letters demanding repayment sent to defendant – Whether defendant's failure to reply tantamount to admission that sums were owed to plaintiff – Whether settlement agreement acknowledged existence of outstanding loan – Whether payments intended by parties to be loan from plaintiff to defendant – Whether claim allowed*

The plaintiff sought the return of the sum of RM2,670,000 from the defendant, which was allegedly a friendly loan from the plaintiff to the defendant. The parties herein held shares in a number of joint venture companies. They had a falling out, and entered into a settlement agreement ('the settlement agreement') to document, *inter alia*, the distribution of the assets of the joint venture. The plaintiff gave evidence that, before their relationship broke down, it was not unusual for them to borrow from each other. However, those loans were not documented in writing. In respect of the money that was the subject matter of the dispute, the defendant in his testimony gave evidence that the money was not transferred for the purposes of a friendly loan, but was instead a financial arrangement that he had with the plaintiff for the purposes of channelling profits from a project called 'Ritze Perdana'. Based on the evidence adduced at trial, money was transferred by the plaintiff to the defendant over a period of ten months, from June 2008 to April 2009. In September 2011, the plaintiff wrote to the defendant requesting for repayment of the so-called loan sums. In May 2012, the plaintiff's solicitors wrote to the defendant demanding repayment. The defendant did not reply to either letter. It was thus advanced by the plaintiff that the fact that the two letters to the defendant in September 2011 and May 2012 were left unreplied by the defendant would tantamount to an admission by the defendant that such sums were indeed owed by him to the plaintiff. It was also advanced by the plaintiff that since the defendant had not disputed his receipt of the money in question, it became incumbent upon him to show why the money ought not be re-paid. The plaintiff further argued that the evidence of the defendant purporting to explain the nature of the payments ought not be admissible, on the basis that the purported reasons for the payment were not pleaded in the defence.

**Held (dismissing plaintiff's claim with costs):**

**(1)** Whether or not a court should draw an inference from the silence of a party must depend on the particular factual circumstances of each case. There should be a reasonable degree of contemporaneity between the

fact of the agreement and the letter recording its terms (*David Wong Hon Leong v. Noorazman Adnan*, refd). In the present case, the amounts were transferred by the plaintiff between the period of June 2008 to April 2009. The plaintiff's letter was written more than two years later, while his solicitor's demand was made more than three years after the last transfer of the money. Accordingly, the evidentiary value of the silence on the part of the defendant was next to naught. The plaintiff had not proven, on a balance of probabilities, that the payments that had been made to the defendant were for the purposes of a loan. The plaintiff conceded that there was no evidence that the payments were in the nature of a loan, apart from the testimony of the plaintiff himself. (paras 19, 20 & 46)

**(2)** The Court of Appeal in *Tan Aik Teck v. Tang Soon Chye* did not go so far as to establish a general principle of law that imposes a presumption of a loan, once the fact of payment and receipt of money was proved. Accordingly, it was not for the defendant in this case to bear the evidentiary burden to show that the payment was for some purpose other than a loan. (para 47)

**(3)** The settlement agreement that was entered into between the parties meticulously dealt with not only the distribution of the assets of the joint venture but also the apportionment of liabilities. Yet the settlement agreement did not deal with, let alone acknowledge, the existence of any outstanding loan from the plaintiff to the defendant arising from the payments that were the subject matter of the dispute. (para 48)

**(4)** The existence of the financial arrangement was a material fact upon which the defendant relied on in order to establish the fact that the payments were not in the nature of loans. The failure to plead a fact upon which a party intended to rely on at trial would preclude the party from subsequently raising it in argument. However, this court's finding that the payments were not in the nature of loans was made without taking into account the evidence of the defendant relating to the purported financial arrangement, which was determined to have offended the rules relating to pleadings. In other words, disregarding the affirmative (and unpleaded) case of the defendant, the plaintiff had failed to prove, on a balance of probabilities, that the payments were intended by the parties to be a loan from the plaintiff to the defendant. (para 49)

**Case(s) referred to:**

*Abrath v. North Eastern Railway Co [1883] 11 QBD 440* ***(refd)***

*Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA* ***(refd)***

*David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA* ***(dist)***

*Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC* ***(refd)***

*Philipps v. Phillips [1878] 4 QBD 127* ***(refd)***
*Selvaduray v. Chinniah [1939] 1 LNS 107 SC* ***(refd)***
*Tan Aik Teck v. Tang Soon Chye [2007] 5 CLJ 441 CA* ***(refd)***
*UN Pandey v. Hotel Marco Polo Pte Ltd [1978] 1 LNS 223 HC* ***(refd)***

**Legislation referred to:**
Evidence Act 1950, ss. 101, 103
Rules of Court 2012, O. 18 r. 7

*For the plaintiff - Kamaleswari Shanmugam Chettier; M/s Kamales & Partners*
*For the defendant - CT Siew; M/s Abdullah Ooi & Chan*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Azizul Azmi Adnan JC:**

### Introduction

**[1]** The plaintiff, Gerard Pereira, sought the return of the sum of RM2,670,000 from the defendant, Dato' Kasi Palaniappan, which sum the plaintiff alleged was paid as part of the friendly loan to the defendant.

**[2]** It was never in dispute that the sum of RM2,670,000 was received by the defendant from the plaintiff. The defendant however argued that the sum was not in fact paid as part of a loan from the plaintiff to the defendant, but was instead part of a financial arrangement, the details of which will be described further, post.

**[3]** The crux of this case was therefore the issue of the nature of the payments made to defendant.

### Salient Facts

**[4]** The parties were once friends, and together held shares in a number of joint venture companies. They had a falling out, and entered into a settlement agreement on 10 August 2009 (the settlement agreement) to document, among others, the distribution of the assets of the joint venture. The details of the joint venture and of the settlement need not detain us for the purposes of this judgment, except that the observation may be made that even though the settlement agreement spelled out in a fair degree of detail the manner of the distribution of the assets and liabilities of the joint venture, it was silent on the subject matter of the so-called friendly loans.

**[5]** The plaintiff gave evidence that, before their relationship broke down, it was not unusual for them to borrow from each other. These loans were not documented in writing.

**[6]** However, in respect of the money that was the subject matter of the dispute, the defendant in his testimony gave evidence that the money was not transferred for the purposes of a friendly loan, but was instead a financial arrangement that he had with the plaintiff for the purposes of channelling profits from a project called "Ritze Perdana". An important legal issue arose from this evidence, as the counsel for the plaintiff argued that such a defence was not pleaded and therefore cannot be raised at trial.

**[7]** Based on the evidence adduced at trial, money was transferred by the plaintiff to the defendant over a period of approximately 10 months, from June 2008 to April 2009. In September 2011, the plaintiff wrote to the defendant requesting for repayment of the so-called loan sums. In May 2012, the plaintiff's solicitors wrote to the defendant demanding repayment. The defendant did not reply to either letter. I note for completeness that the sums claimed in this action were lower than the figures specified in the two letters, again for reasons that need not concern us for the purposes of this judgment.

*The Decision Of This Court*

**[8]** On 14 May 2015, I dismissed the plaintiff's claim with costs. The plaintiff filed a notice of appeal on 10 June 2015. The reasons for my decision are set out in the following paragraphs.

**The Plaintiff's Submissions**

**[9]** In the course of submissions, counsel for the plaintiff conceded there was no evidence that the payments were in the nature of loans to the defendant, apart from the testimony of the plaintiff himself.

*The Unreplied Letters*

**[10]** Nonetheless, it was advanced on behalf of the plaintiff that the fact that the two letters to the defendant in September 2011 and May 2012 were left unreplied by the defendant would tantamount to an admission by the defendant that such sums were indeed owed by him to the plaintiff. If the defendant did not owe any money to the plaintiff, then surely – argued counsel for the plaintiff – the defendant would have replied with an indignant denial.

**[11]** Support for this interpretation of events is found in the case of *David Wong Hon Leong David v. Noorazman Adnan*[1]. In this case, the defendant was a director of a company that owned land adjacent to the prestigious Country Heights in Kajang. The company proposed to develop the land and for this purpose it was necessary to convert its category of use from agriculture to residential and to sub-divide the titles for the land. There was also an issue relating to access to the proposed development, and it was common ground that gaining access to the land through Country Heights would greatly enhance the value of the development. An application to the office of the land administrator for the district of Ulu Langat was made on 26 January 1991. (The dates in this case are significant, as we shall see later).

**[12]** At about this time, Wong, the defendant was introduced to Noorazman, the plaintiff, whose assistance he sought in connection with the application for conversion and sub-division. Wong was told by Noorazman that he knew the Menteri Besar at that time and other senior state government officers, and was prepared to assist, for the not-inconsiderable sum of RM268,888. It is common knowledge that Noorazman's father-in-law preceded the then Menteri Besar in office.

**[13]** I pause here to remark that it is a sad indictment of society that such facilitation fees are thought necessary for the discharge of public duties. This needs to be said, lest the reader forms the view that such is an acceptable state of affairs.

**[14]** On 28 January 1991, a letter was written to the Menteri Besar on the letterhead of the defendant's company, which letter was signed by Noorazman and who bore the appellation "project manager". This letter asked for the early approval of the application.

**[15]** Noorazman later produced the same letter to Wong. There was a hand-written note in the letter, addressed to the Ulu Langat land administrator with the words "Disokong". This note was signed by the Menteri Besar. Having seen this letter, Wong paid RM100,000 to Noorazman.

**[16]** The state Executive Council gave its approval for the company's application on 12 August 1992 and on 16 September 1992, the land administrator informed the company that its application had been approved. The issue of access was however not addressed.

**[17]** At this point, it will be useful to segue into the judgment of Gopal Sri Ram JCA, delivering the decision of the Court of Appeal:

> On 17 December 1991, the respondent wrote to the appellant confirming an agreement between them whereby the former was to receive an additional fee of RM100,000 if he assisted in resolving the problem regarding the access. It is the respondent's case that he did in fact obtain the required access through his exertions. The appellant, however, denies any agreement to pay the additional fee. In respect of this sum, the learned judge granted leave to defend. We would digress for a moment to say a few words about this latter order of the learned judge.
>
> During argument, we registered our surprise at the learned judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December 1991. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.
>
> In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v. Chan Thean Soo* [1987] 2 MLJ 479 at p 487:

A In *Wiedemann v. Walpole* [1891] 2 QB 534 at p. 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.

B Lord Esher MR, in his judgment, remarked, 'Here, we have only to see whether **the mere fact** of not answering the letters, **with nothing else** for us to consider is any evidence in corroboration of the promise'. (emphasis supplied). Earlier, in his judgment, he said, '*Now there are cases - business and mercantile cases in which the courts have*
C *taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree*'. (emphasis added)

**[18]** Counsel for the plaintiff referred to the finding of the Court of Appeal
D that, the fact that Wong had not responded to Noorazman's letter of 17 December 1991 with a prompt and vigorous denial tended to show that such an agreement did in fact exist between them. This case, argued counsel, supported her proposition that the failure of the defendant to reply to the letters of September 2011 and May 2012 amounted to an admission by the
E defendant that the amounts paid to him were indeed in the nature of loans.

**[19]** In my judgment, whether or not a court should draw an inference from the silence of a party must depend on the particular factual circumstances of each case. The protean and multitudinous nature of cases before a judge necessarily means that no judge can be bound by a particular finding of fact
F by a court that had preceded him or her. In *David Wong Hon Leong v. Noorazman bin Adnan*, the letter must have been written within a period of not much more than three months after the agreement, because the decision of the land administrator was communicated on 16 September 1992 and the letter from Noorazman reciting the fact of the agreement on the issue of
G access was dated 17 December 1991. To my mind, there was a reasonable degree of contemporaneity between the fact of the agreement and the letter recording its terms.

**[20]** In the present case, the amounts were transferred by the plaintiff between the period of June 2008 to April 2009. The plaintiff's letter was
H written more than two years later, while his solicitor's demand was made more than three years after the last transfer of the money. Both were, in all likelihood, made in preparation for trial. Accordingly, in my view, the evidentiary value of the silence on the part of the defendant is next to naught.

**[21]** As counsel for the defendant argued, there could have been many
I reasons why the defendant had not replied, not least the fact that he considered the demand so preposterous that he did not wish to dignify it with a reply.

*The Onus Of Proof*

**[22]** It was also advanced for the plaintiff that, since the defendant had not disputed his receipt of the money in question, it became incumbent upon him to show why the money ought not be repaid. In effect, counsel for the plaintiff was arguing that, once the fact of payment and receipt has been proven, there arose a legal presumption that the transfer was for the purposes of a loan. Ms Kamaleswari for the plaintiff cited the case of *Tan Aik Teck v. Tang Soon Chye*[2] as authority for this somewhat striking proposition.

**[23]** The Court of Appeal in *Tan Aik Teck* stated:

> The plaintiff admitted that there was no loan agreement in respect of the loan given to the defendant. The loan given could only be proved by the two cheques which were paid into the defendant's account and also the admission by the defendant that he had put the money into his bank account. Since the defendant had admitted that he had received the two cheques and had credited them into his account, I am of the view that the plaintiff had discharged his burden that the money was a loan unless proven otherwise by the defendant. As such, the burden is on the defendant that the money given to him by the plaintiff was not a friendly loan.

**[24]** The plaintiff in this case sued for the return of a friendly loan. The defendant did not dispute that an amount of money was paid to him, but claimed that the amount was not a loan, but payment for a different purpose, which was within the knowledge of the plaintiff and the plaintiff's brother-in-law, Goh Wai Kah, who was at that time the managing director of a publicly listed company, Tenco Berhad. The defendant (and appellant at the Court of Appeal), Tan Aik Teck, was at the material time a majority shareholder in Tenco Berhad[3].

**[25]** The evidence of the plaintiff was that Goh had asked the plaintiff to extend a loan of more than a million ringgit to the defendant.

**[26]** The defendant's explanation for the payment was somewhat more involved, and is outlined in detail at paras. 12 and 13 of the judgment. In essence, the defendant alleged that the plaintiff was Goh's nominee in a company (RCR) that was to be injected into Tenco Berhad as part of a larger corporate restructuring exercise, and that the plaintiff would hold for Goh the Tenco shares that would be issued in consideration for the sale of RCR. The proceeds of sale of these shares would be channelled through a "loan" to the defendant, which was then subsequently disbursed substantially in cash to Goh. The observation may be made that the alleged arrangement would have in all likelihood been subject to the rules in the listing requirements of Bursa Malaysia (then the Kuala Lumpur stock exchange) relating to related party transactions, if the nominee arrangement between Goh and the plaintiff became transparent. This provides a possible answer to the question posed

by Mokhtar Sidin JCA at para. 14 of the judgment as to why were not cheques issued by the defendant to Goh directly. To do so would have established a money trail between the plaintiff and Goh.

**[27]** Under s. 101 of the Evidence Act 1950, the plaintiff bears the burden of proving his case. The evidentiary burden to prove that these existed a loan should also lie with the plaintiff, in accordance with s. 103 of the Evidence Act 1950. In a civil case, the evidential burden with respect to a fact in issue does not shift to other party (notwithstanding cases to the contrary, such as, for example *UN Pandey v. Hotel Marco Polo Pte Ltd*[4]), because, as a practical matter, the court does not make a determination whether a *prima facie* case has been established at the end of the plaintiff's case. Instead, what happens is that the judge would, at the end of the trial, evaluate all available and properly admitted evidence to ascertain whether the party who bears the evidential burden of proving a fact in issue has, on a balance of probabilities, discharged that burden. Of course, a defendant may make a submission of no case to answer, but even here the process of determining findings of fact is the same: the judge asks himself or herself if the party bearing the evidential burden has proven the existence of a postulated fact on a balance of probabilities.

**[28]** In undertaking this evaluation, a judge in a civil case does not look at the evidence adduced by the party bearing the onus of proof in isolation. The body of evidence is assessed in totality, taking also into account the evidence adduced by the opposing party, to ascertain the answer to the question of whether the party has discharged his evidentiary burden of proving, on a balance of probabilities, the existence of a particular fact in issue.

**[29]** Support for this proposition is found in the English Court of Appeal case of *Abrath v. North Eastern Railway Co*[5]:

> But then it is contended (I think fallaciously), that if the plaintiff has given *prima facie* evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the propositions ought to be stated thus: the plaintiff may give *prima facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: *the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer*; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff, they must find for the defendant. Then comes this difficulty- suppose that the jury, after considering the evidence, are left in real doubt

> as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him. (emphasis added)

**[30]** This excerpt from the judgment of Brett MR was cited with approval and applied in Malaysia by the Court of Appeal in *Selvaduray v. Chinniah*[6].

**[31]** In my considered opinion, the decision of the Court of Appeal in *Tan Aik Teck* does not establish a general principle of law that, where the existence of a friendly loan was alleged, all that the party bearing the evidential burden needs to show is the fact of payment and receipt, which thereafter places the evidential burden on the other party to show that the payment was for some other purpose. Careful analysis of the case will reveal that the Court of Appeal considered the veracity of the testimony of the defendant and his sister (who testified for him) and found their testimonies that the money had been disbursed to Goh not to be true. As such, the court found that the plaintiff had discharged his evidentiary burden of proving that the money had been transferred for the purposes of a friendly loan. In other words, the Court of Appeal was simply applying the principles embodied in s. 103 and the case of *Abrath v. North Eastern Railway Co*. There is no legal presumption of a loan (friendly or otherwise) that arises in favour of a plaintiff who proves the fact of payment and receipt of money.

**The Defendant's Submissions**

**[32]** The defendant's position was that the payments made to him were not in the nature of loans, but were in fact part of a financial arrangement aimed at ensuring that money that was due to the defendant was paid to him. The nature of the financial arrangement is described further at paras. 34 *et seq*., *post*.

**[33]** The counsel for the plaintiff, Ms Kamaleswari, argued that the evidence of the defendant purporting to explain the nature of the payments ought not be admissible, on the basis that the purported reasons for the payment were not pleaded in the defence. Ms Kamaleswari further pointed out that the defence amounted to no more than a bare denial. In reply, Mr CT Siew for the defendant argued that the defence had been adequately pleaded, and that which was sought to be adduced at trial was merely evidence, which need not and indeed should not be included in pleadings. The analysis of this legal issue is set out in paras. 40 *et seq*., *post*.

*The Financial Arrangement*

**[34]** In order to understand the financial arrangement claimed by the defendant to have existed, it will be necessary to delve a little into the background of the circumstances surrounding the dispute.

**[35]** The defendant testified that he had a beneficial interest in 35% of the shares in a company known as Gamelan Rentak Sdn Bhd (Gamelan), even though he was not registered as a shareholder in this company. The remainder of the shares in Gamelan, according to the defendant, was beneficially owned by Tan Sri Mustapha Kamal, the developer and a joint venture partner of the defendant[7].

**[36]** Gamelan was the developer of a high-rise mixed development project known as Ritze Perdana in Damansara Perdana. The defendant gave evidence, which was not disputed, that a company known as MK Project Management Sdn Bhd was appointed as the project manager for the Ritze Perdana development. 35% of the issued and paid-up share capital in MK Project Management Sdn Bhd was owned by the defendant, with the remaining 65% owned by Tan Sri Mustapha Kamal.

**[37]** The plaintiff was the director of and shareholder in a company known as Syarikat Perumahan Sunshine Sdn Bhd (Sunshine). Sunshine was appointed by MK Project Management Sdn Bhd to be the exclusive sales and marketing agent to sell the units in the Ritze Perdana development. The facts thus far recited were not in dispute.

**[38]** The defendant testified that he had procured the appointment of Sunshine as the exclusive sales and marketing agent for the Ritze Perdana development. The defendant further testified that he had an agreement with the plaintiff for the plaintiff to pay, out of the amounts received by Sunshine from Gamelan, certain amounts to the defendant. This was to facilitate, according to the defendant, the payment of certain profits due to him from Gamelan. There was, however, no documentary evidence of either the purported agreement between the plaintiff and the defendant regarding the amounts to be paid to the defendant, or the amounts due from Gamelan to the defendant. It may further be observed that the sums were paid by the plaintiff not to MK Project Management Sdn Bhd but to the defendant personally. The defendant further testified that the sums were beneficially his, and that he was not holding the sums on trust for, or for the benefit of, any other person[8]. The defendant denied that the payments were a "kick back" for the appointment of Sunshine, but was not able to tell the court whether the directors of Gamelan were aware of the financial arrangement.

**[39]** I confess to harbouring misgivings regarding this purported financial arrangement but the legality or otherwise of the financial arrangement was not an issue before me in this trial.

*Whether The Defence Was Pleaded*

**[40]** This brings us now to the point raised by Ms Kamaleswari for the plaintiff. She argued that the defence simply contained a bare denial of the existence of the friendly loan. The defendant was therefore precluded, argued counsel, from raising additional facts that were not pleaded.

**[41]** Ms Kamaleswari cited the case of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd*[9] and the following oft-quoted passage from the judgment of Gopal Sri Ram JCA:

> Now, it is a cardinal rule of pleading that a defendant to an action for breach of duty - whether in contract or tort - may properly deny liability and require the plaintiff to prove his or her claim. But once a defendant takes that course, he must stand or fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct. So, in *Regina Fur Co Ltd v. Bossom* [1958] 2 Lloyd's Rep 425 (folld), 428, Lord Evershed MR said:
>
> > I think that a defendant - whether he is an underwriter or any other kind of defendant - is entitled to say, by way of defence, 'I require this case to be strictly proved, and admit nothing'. Where such is the defence, the onus remains throughout upon the plaintiffs to establish the case they are alleging. Where such is the form of the pleading, it is not only not obligatory upon the defendants but it is not even permissible for them to proceed to put forward some affirmative case which they have not pleaded or alleged: and it is not therefore, right that they should, by cross-examination of the plaintiffs or otherwise, suggest such an affirmative case. The defendants are acting correctly if they follow the course adopted in this case - that is, so to challenge, at each point, and by proper evidence, where it is admissible, and by cross-examination, the case which the plaintiffs seek to make good.
> >
> > The result, where such is the form of the defence and of the issues raised, is no doubt such that the judges will watch carefully that defendants, first, do not attempt by evidence or cross-examination, to establish some affirmative case of which no proper notice has been given by way of pleading to the other side; and second, do not attempt to lead evidence solely directed to the credit of witnesses.

**[42]** Mr Siew replied that the defence had been adequately pleaded and that the testimony of the defendant explaining the nature of the financial arrangement was merely evidence, which the defendant need not – and indeed could not, by virtue of O. 18 r. 7 of the Rules of Court 2012 – include in his defence.

**[43]** Guidance on the distinction between facts, material facts and evidence can be found from the following passage from the judgment of Brett LJ in *Philipps v. Phillips*[10]:

> I will not say that it is easy to express in words what are the facts which must be stated and what matters need not be stated. I know that great pains were taken to draw rule 4, and it is difficult to state the matter more clearly than in that rule. The distinction is there pointed out that every pleading shall contain a statement of the material facts on which the party

A pleading relies, but not the evidence by which they (that is, those material facts) are to be proved. The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle, C.J., expressed it in this way. He said there were facts that might be called the *allegata probanda*, the facts which ought to be proved, and they were different from the evidence which was adduced to
B prove those facts. And it was upon that expression of opinion of Erle, C.J., that rule 4 was drawn. The facts which ought to be stated are the material facts on which the party pleading relies. It was purposely not put: "the facts which will be necessary to support the cause of action;" for the party might not be able to state such facts; as, for instance, he might only know such facts as would render his case demurrable, and could only state facts
C which would not be sufficient to maintain the cause of action; but he states the facts on which he intends to rely at the trial.

There are some tests which shew practically what the rules mean. I think that in a pleading under the new rules such facts ought to be stated which, if a person had had to state a special case formerly for the opinion of the
D Court, he would have stated in the special case as facts. If a person had to state a special case as an arbitrator, there are certain facts which he must find and state, but he does not state the evidence upon which he was brought to find those facts; and the difference, although not so easy to express, is perfectly easy to understand. An arbitrator had to state every fact which would support, when proved, the contention of the person on
E whose behalf he was stating that fact. He did not state the evidence by which he came to find those facts. Now such facts as would be stated in a special case to support or meet the claim are precisely the facts which are to be stated under the new system. It seems to me that there is another test. If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a
F fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings. *Therefore, again, in their pleadings they ought to state every fact upon which they must rely to make out their right or claim*. (emphasis added)

G **[44]** It is tolerably clear in the present instance that the existence of the financial arrangement was a material fact upon which the defendant relied in order to establish the fact that the payments were not in the nature of loans. The failure to plead a fact upon which a party intends to rely at trial will preclude the party from subsequently raising it in argument. The reason for this is as stated by Mohd Azmi SCJ in delivering judgment at the Supreme
H Court in the case of *Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors*[11]:

... the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmore Productions v. Hamilton* [1983] 1 AC 191 at p 233:

I

> Under our adversary system of procedure, for a judge to disregard the rule by which counsels are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any peril adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

**[45]** The defendant, in his pleaded defence, denied the existence of the friendly loan and put the plaintiff to strict proof of his claim. There was no plea of an affirmative case, namely, that the payments were made in furtherance of the financial arrangement. It was therefore not open to defendant to pursue in argument an unpleaded affirmative case.

**Decision**

**[46]** I found that the plaintiff had not proven, on a balance of probabilities that the payments that had been made to the defendant were for the purposes of a loan. Counsel for the plaintiff conceded that there was no evidence that the payments were in the nature of a loan, apart from the testimony of the plaintiff himself. I distinguished the case of *David Wong Hon Leong v. Noorazman Adnan* on the basis that in that case there was contemporaneity between the oral agreement and the letter confirming the terms of the agreement. In our present case, the letters were given much later, more than two years after the last payment under the purported loans, and, in all likelihood, with litigation in mind. See paras. 19 to 21, *ante*.

**[47]** In my judgment, the Court of Appeal in *Tan Aik Teck v. Tang Soon Chye* did not go so far as to establish a general principle of law that imposes a presumption of a loan, once the fact of payment and receipt of money is proved. See para. 31, *ante*. Accordingly, it was not for the defendant in this case to bear the evidentiary burden to show that the payment was for some purpose other than a loan.

**[48]** The settlement agreement that was entered into between the parties meticulously dealt with not only the distribution of the assets of the joint venture but also the apportionment of liabilities. Yet the settlement agreement did not deal with, let alone acknowledge, the existence of any outstanding loan from the plaintiff to the defendant arising from the payments that were the subject matter of the dispute.

**[49]** My finding that the payments were not in the nature of loans was made without taking into account the evidence of the defendant relating to the purported financial arrangement, which I determined to have offended the rules relating to pleadings. In other words, even disregarding the affirmative (and unpleaded) case of the defendant, the plaintiff has failed to prove, on a balance of probabilities, that the payments were intended by the parties to be a loan from the plaintiff to the defendant.

**[50]** The plaintiff's claim was dismissed with costs of RM20,000.

**Endnotes:**

1. [1995] 4 CLJ 155; [1995] 3 MLJ 283.
2. [2007] 5 CLJ 441; [2007] 6 MLJ 97.
3. See judgment of Abdul Wahab Patail J at first instance: [2007] 1 LNS 285; [2006] MLJU 589.
4. [1978] 1 LNS 223; [1980] 1 MLJ 4 (HC).
5. [1883] 11 QBD 440.
6. [1939] 1 LNS 107; [1939] MLJ 253.
7. See p. 54 of the notes of proceedings.
8. See p. 69 of the notes of proceedings.
9. [2004] 1 CLJ 357; [2004] 1 MLJ 353.
10. (1878) 4 QBD 127 (CA).
11. [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116; [1989] 2 MLJ 416.